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In This Issue

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VOL. 26 JANUARY, 1951 No. 5

THE PRESIDENT'S PAGE

Results of Plebiscite With Respect to Proposed Enlargement of Association Quarters:

Dana Latham

I AM SURE the membership will be interested in the results of our recent plebiscite dealing with the proposal to enlarge our quarters.

Of the questionnaires mailed out, more than 50% were returned, by all odds the largest percentage return on any matter submitted to our membership within the recollection of our Executive Secretary, who has been with us more than twenty years.

Of those responding, 72.4% were in favor of the proposal to enlarge. In this connection, it is interesting to note that more than 25% of those who voted Yes indicated their approval even though they did not expect to use our proposed luncheon facilities. In other words, their ballot, and properly so, was based upon their belief that the proposed program would be generally beneficial to the Association.

Approximately the same percentage who voted in favor of the project voted in favor of a luncheon service. On the other hand, more than 80% of those responding stated that they would use our luncheon facilities at least once per week. In other words, a number of those who were not in favor of establishing any additional facilities stated that they would use the facilities if established.

In considering the type of luncheon facilities to be offered approximately 50% of those replying stated that they would prefer the buffet luncheon at from 90¢ to $1.15 and the balance preferred a regular luncheon or sandwich, dessert and beverage. We would, therefore, satisfy approximately 80% of those replying if we could serve a satisfactory luncheon at from 75¢ to $1.15.

On the other hand, but 23.7% of those replying were in favor of establishing any kind of a law library in the proposed new quarters and of those replying less than 8% stated that they would use the library facilities at least once weekly. Under the circumstances, your Special Committee will undoubtedly be compelled to conclude that at present at least no library facilities should or will be established.

Approximately the same percentage who favored the general plan and the provision for luncheon facilities also favored appropriate lounge facilities. In other words, a place to sit and "visit" before or after luncheon.

Finally, of those replying, only 42% were members of any downtown club or similar organization. While we have no means of knowing the percentage of club members among those not replying, it would probably be less and certainly no more than the percentage applicable to those who responded.

An analysis of the questionnaire would appear to indicate the following:

(1) There is a very substantial and gratifying interest in the proposed project which in effect would seem to constitute a mandate from the membership for our Special Committee to formulate and present to the membership through your trustees the completed plan of operation. This is in process at present and will be presented as soon as possible.

(2) Since there will be, at least in the beginning, no library, the initial cost will be substantially reduced and in addition space that would otherwise be used for a library will be available for increased luncheon and lounge facilities.

That such will be the case is undoubtedly quite fortunate. The response to our questionnaire indicates that luncheon facilities which will not seat more than 80 at one time will probably be quite inadequate. It would appear that luncheon facilities for at least 125 at one seating should be provided.

(3) Since it is apparent that at the outset luncheon and lounge facilities are primarily desired for our membership, it becomes encumbent upon our Special Committee and your Trustees to make certain that these facilities be of the best. Our Special Committee is especially cognizant of the fact

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THE DRIFT FROM THE CONSTITUTION

By Hon. Joseph L. Call*
Judge of the Municipal Court of the City of Los Angeles

Hon. Joseph L. Call

"Government, through its rulers, may be the implement of tyranny."[1]

This was the political condition that confronted the colonists and precipitated the Declaration of Independence and the war of the Revolution.

The fundamental objection of the colonies was that the colonies and Great Britain were co-ordinate members of the great English empire under the dominion of a common sovereign but not united by common legislative sovereignty or legislative rights. The colonists declared that their legislative power to govern themselves was as completed and distinct as that of the English parliament to govern England. Great Britain maintained that the colonies were subject to English parliamentary laws and royal executive decrees emanating from the homeland. The assertion of the right of self-government by the colonists, a denial of this principle by England and the arbitrary assumption of the right of Great Britain to make laws for all constituents of the English empire without their right of participation or self-government, in each and every instance, led to the discovery by England that she had no right to make laws for the colonists in any respect whatsoever.[2]

This led to the Declaration of Independence by the thirteen colonies in which the basic and ever-underlying premise of American government was emphasized, and that was that ". . . all men are created equal; that they are endowed by their Creator with *certain inalienable rights;* that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, *deriving their just powers from the consent of the governed* . . ."[3]

These principles of (a) the inherent sovereignty of the people;

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[1]Excessive Law Making—A Threat to Liberty, by Robert M. Jones, Tennessee Law Journal, Vol. 16.

[2]Madison's Report on the Virginia Resolution (1800). Elliot's Debates on the Federal Constitution, Vol. IV, page 562.

[3]"Declaration of Independence," adopted in Congress, July 4, 1776.

and (b) the consequential creation of government to maintain these rights, deriving its powers from the consent of the governed, therefore gave rise to the Bill of Rights of the thirteen original states and thereafter the Bill of Rights to the United States Constitution.

It is seen that the doctrine of inherent sovereignty of the people is the major premise upon which this government was founded, and that very obviously all public officials are agents and agents only of the sovereign power, to wit, the people; and that consequently, the inherent right of self-government is always the primary right of the people:

The assertion of these rights by the American people gave rise to seven years of merciless and bloody revolutionary war and incredible hardships, but was finally culminated by the independence of the American colonies climaxed by the surrender of General Cornwallis at Yorktown, October 19, 1781; and thereafter emerged the thirteen original colonies as free and independent states.

It is well to note that these states came into existence as separate governments and entities; and each retained all of the rights of self-government, self-regulation, and all rights incident to complete sovereignty. They were independent of any other state or nation. Any problems, situations, improvements or social adjustments, all found adequate protection and comprehension within and by reason of the sovereign power of the individual state. None of these states was inadequate to determine fully on all matters of internal concern.

There were, however, certain limited problems that the people felt they were unable adequately to contend with. These inadequacies of the states acting as political units are stated by the Constitutional Convention of 1787 in its letter recommending to Congress the adoption of the new Federal Constitution. This letter is signed by George Washington and presents this limited state inadequacy as follows: "The friends of our country have long seen and desired, that the power of making war, peace and treaties; that of levying money and regulating commerce; and the corresponding executive and judicial authorities should be fully and effectively vested in the general government of the union."[4]

[4]"The Growth of Federal Bureaucratic Tyranny," by Sterling E. Edmunds, "The Lawyer and Banker," Vol. 36 (1933).

Throughout the debates in the Constitutional Convention was the constant insistence that in the dual system of government about to be formulated, the rights and the sovereignty of the people and the states were to remain supreme in all matters of local and self-government, but subject to certain powers to be expressly granted or delegated under the terms of the proposed Constitution to the proposed federal government.

And, the insistence of these principles in convention debate was certainly not without precedents garnered from the rise and fall of government throughout history. Under the postulates of European monarchies and under the prerogatives of the Roman civil law, the state or government is exemplified as all-powerful, all-knowing, all-wise and even of divine origin. A corollary of this premise was it therefore became the duty of the government, that in order to achieve supreme success and happiness for the people, the state or government must obviously regulate and prescribe for all human endeavors, and that the deity of the state naturally denied the right of the individual to work out his own problems, and to prescribe his own methods of procedure. This theory of government postulated from the time of the disintegration of the Roman republic at the time of the formation of the First Triumvirate, approximately fifty years B.C., found expression and was fully bearing fruit at the time of the American Constitutional Convention. The European theory advocated that the government of monarchy and dictatorship was all-knowing and all-powerful, and was predicated on the premise that the people whom it sought to govern were utterly incapable of governing themselves and prescribing their own rules and regulations. Its purpose was that of dictating to and for the lives of its peoples.

Consequently, at the Constitutional Convention, it was the considered opinion of the members of the Convention that the state was not divine nor omnipotent nor omniscient, but that, on the contrary, sovereignty, law and regulation were rights of the people, and that the official was but an agent of the people placed in office for the purpose of administering laws enacted by the people, and that every individual had the right without the interference or intermeddling of government to formulate his own happiness and his own laws.

Accordingly, with the ever-retained sovereign rights of the people as the major premise, there was formulated the United

States Constitution (September 17, 1787) retaining all rights of the states and inherent rights of the people in *statu quo*, except such powers as were therein expressly given and delegated to the federal government. Under the Federal Constitution there are created three separate and distinct departments of government. Article I creates and delegates power to the Legislative or Congressional department; under Article II there is created and delegated power to the Executive department; and under Article III there is created and delegated power to the Judicial department. Each department of government, under this novel system, is supreme within its own field, but, nevertheless, acts as a check-balance upon the other departments.

Although the sovereignty of the people and the states, under the Constitution, as submitted and adopted in 1787, was clearly supreme, nevertheless the people were so zealous of these unalienable rights and fearful of the usurpation of power by the Federal government and that tyranny under the pretense of constitutional authorization might become enthroned, that the thirteen states thereafter adopted, in 1791, the Ninth and Tenth Amendments to the Federal Constitution. These amendments again reaffirmed the limitations of the Federal government and the sovereign rights of the states and the people as independent political units. These amendments at the time seemed to satisfy the minds of the most skeptic, and were thought to definitely and finally put to an end the respective rights and any possible contentions that might arise under the relative rights of the dual government.

Article I, section 8, of the Federal Constitution enumerates eighteen specific grants of power by the people to the United States Congress. Among these grants there may be listed the following fundamental rights affecting the life and liberty of the people of the Country:

1. The power to lay and collect taxes, duties, imposts, and excises;

2. To pay the debts of the United States;

3. To provide for the common defense and general welfare of the United States;

4. To borrow money on the credit of the United States;

5. To regulate commerce with foreign nations and among the several states and with the Indian tribes;

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CHATTEL MORTGAGES

Some Problems Arising From a Failure To Comply With Statutory Requirements

By Ronald C. Roeschlaub and Roy Littlejohn*

Ronald C. Roeschlaub

Roy Littlejohn

Chattel Mortgage transactions, as they are known today, were accepted initially only after the legislature had prescribed a recording procedure as a substitute for the previously required change of possession.[1] From time to time this recording procedure has been revised and today's version of the general chattel mortgage recording statute is found in Civil Code, Sections 2955 and following.

After specifying what chattels may properly be subjected to a chattel mortgage[2] and specifying in general the form that the chattel mortgage must take,[3] the statute specifically provides that unless "a mortgage of personal property or crops" is either duly acknowledged or proved and certified and is clearly entitled as such and is recorded as prescribed therein, it is void as to certain persons.[4] Section 2957 requiring acknowledgment, etc., and recording is the only section which prescribes any consequences of non-compliance. As a result, defects as to subject matter under Section 2955,[5] and defects as to form under Sec-

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[1]Cal. Stats. 1850, pp. 199, 201, Section 17 of the Fraudulent Conveyance Statute, required a transfer of possession to the mortgagee. Cal. Stats. 1857, p. 347, prescribed the first chattel mortgage recording procedure.

[2]Civil Code, Section 2955.

[3]Civil Code, Section 2956.

[4]Civil Code, Section 2957. "A mortgage of personal property or crops is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless * * *." Obvious limitations here do not permit special consideration of Civil Code, Section 2965, which specifies consequences for failure to comply with certain mobile recordation requirements set forth therein, or of Vehicle Code, Sections 195 *et seq.*, relating to chattel mortgages of registered motor vehicles.

[5]*Old Settlers Investment Company v. White*, 158 Cal. 236, 110 Pac. 922 (1910).

tion 2956,[6] as well as the defects in the acknowledgment, etc., and recording procedure expressly prescribed in Section 2957, are all dealt with generally under that part of Section 2957 which specifies the consequences of non-compliance.

In addition to the express requirements of the statute, the Supreme Court, in order to fully effectuate the purposes of the statute, has prescribed that the initial recording of the chattel mortgage must be "immediate."[8] This Court-imposed requirement of "immediate" initial recordation of the chattel mortgage probably causes more difficulties than do the statutory requirements.

Where this statutory pattern, plus the Court-imposed requirement of "immediacy," is fully complied with, the rights of the respective parties are clearly determinable. However, in applying these requirements the cases have consistently demanded strict compliance,[9] and, as a result, non-compliance is a frequent issue.

It is interesting to consider some of the problems that arise when there is a failure to strictly comply with these requirements.

1. The Position Required of One Asserting the Invalidity of the Chattel Mortgage

Even though the chattel mortgage is defective and therefore "void" within the language of the statute,[10] not everyone as to whom the mortgage is supposed to be void can take advantage of such invalidity. A well established principle, developed by the cases apart from the statute, requires that one asserting the invalidity of the mortgage must be in a position to assert some specific right in the mortgaged property, which right would be adversely affected by the enforcement of the chattel mortgage according to its terms.

A subsequent purchaser or a subsequent encumbrancer of the mortgaged property necessarily has such a specific right in the property.[11] Not so with creditors. A mere unsecured creditor

[6] *Kahriman v. Jones*, 203 Cal. 254, 263 Pac. 537 (1928); *In re Norman D. Kessler*, U. S. D. C. (S. D. Cal.) No. 46,737-W M, Los Angeles Daily Journal, July 16, 1949.
[8] *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827 (1899).
[9] See, for example: *Hopper v. Keys*, 152 Cal. 488, 493, 92 Pac. 1017 (1907); *Bowden v. Bank of America*, 97 A. C. A. 802, 213 P. (2d) 1010 (1950).
[10] Civil Code, Section 2957. See Note 4, *supra*.
[11] See *Harms v. Silva*, 91 Cal. 636, 27 Pac. 1088 (1891). *See F. C. Silverthorn & Sons v. Pac. Fin. Corp.*, 133 Cal. App. 163, 23 P. (2d) 798 (1933).

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Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of January, 1926, by A. Stevens Halsted, Jr., Associate Editor.

A. Stevens Halsted, Jr.

NEW YEARS DAY was rung in at Philadelphia by the Liberty Bell. The bell has been silent since July 8, 1835, when it was cracked while tolling for the death of Chief Justice John Marshall.

* * *

A temporary grandstand erected for the Tournament of Roses in Pasadena collapsed during the parade, resulting in 6 deaths and 200 injuries.

* * *

Hearings are being conducted by the Compensation Insurance Commission to determine the legal status of those who suffered injury through the collapse of buildings during the recent Santa Barbara earthquake. The defendant insurance companies contend that they are not liable for injuries of employees as the quake was an act of God. Claimants argue that if construction of the collapsed buildings was faulty to the extent that they would not withstand an earthquake shock, the act of God defense does not obtain.

* * *

Police Judge **Sheldon** will succeed **William M. Bowen,** chief legal counsel of the government dry regime, who has resigned because of ill health. With the appointment of U. S. Commissioner **Raymond I. Turney** to the Municipal Bench, **J. George Ohanneson,** Assistant U. S. Attorney, is being suggested as his successor. Judge Bowen's resignation culminated six months of tremendous effort to clean the prohibition records of musty cases. The strain was too great, and Mr. Bowen is leaving for a three months' visit to the Hawaiian Islands.

THE ATTORNEY AS A TAXPAYER

By Irvin Grant*

Irvin Grant

COMPENSATION received from the practice of a profession is "gross income" as defined by Section 22 of the Internal Revenue Code. All the ordinary and necessary expenses paid or incurred in carry on any trade or business may be deducted from gross income to determine net income.[1] The object of this article is to examine the various sources of tax law to ascertain the extent to which moneys received by an attorney from the practice of his profession need be reported as taxable income, and what expenses incurred by attorneys are proper deductions.

Receipts Taxable as Income

Money received by an attorney on behalf of his client is not income to the attorney, and all such funds should be segregated from the general funds of the attorney. Money received by an attorney as interest on investments owned by clients and managed by the attorney is not taxable income to the attorney.[2] An attorney does not receive taxable income when he is reimbursed for costs advanced on behalf of a client.[3]

Where two or more attorneys have an interest in a fee, the attorney receiving the fee from the client need report as taxable income only that portion of the fee in which he has a beneficial interest. This is true even though that portion of the fee belonging to the attorney's associates has not been turned over to them prior to the end of the tax year.[4]

An attorney, by reason of ill health, assigned to his associate all fees to be collected in a certain case, and the assignee attorney was given authority to complete the work and arrange for the fee. It was estimated that at the time of the assignment approximately two-thirds of the work on the case had been completed. When the attorney collected the fee he claimed that he should be taxed on no more than the one-third of the fee earned through his work on

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[1]I.R.C., Sec. 23(a).
[2]Herbert Choynski, 14 B.T.A. 9 (1928).
[3]Henry F. Cochrane, 23 B.T.A. 202 (1931).
[4]Mark D. Eagleton, 35 B.T.A. 551 (1937), aff'd 97 F. 2d 62 (C.C.A. 8th, 1948).

the case. No contingent fee agreement was involved, and no agreement was reached as to the amount of the fee until the work was completed. It was held that all of the fee was taxable to the attorney finally receiving it. There had been no gift in an amount equal to the value of the fee at the date of the assignment. The court reasoned that there was consideration for the assignment in the agreement of the assignee to complete the case.[5]

The taxing authorities have always taxed income earned in an illegal manner, and it has been held that where an attorney who was the executor of an estate unethically shared in the fees awarded to the law firm acting as attorneys for the estate, all sums received by the attorney constituted taxable income to him. Sums received in this manner could not be considered a gift.[6]

Where a fee is received by an attorney pursuant to a contingent fee agreement under a mistake of fact as to the occurrence of the contingency which would make the fee payable, the attorney receives the fee impressed with a trust in favor of the client. In such a case the attorney does not receive taxable income until the contingency occurs.[7]

There have been repeated attempts by attorneys to convert income from professional fees taxable as ordinary income into long term capital gains which receive more favorable consideration under the tax laws. The taxing authorities and the courts will examine the source of the income, and if the attorney performed professional services to produce the income, ordinary income will result. A client assigned to his attorney a 40% interest in a claim against the U. S. Shipping Board Emergency Fleet. Under the agreement the attorney was to establish the client's claim for expropriation of ships during World War I. The attorney received $160,000 under this agreement and he claimed this income to be a long term capital gain. The attorney's contention was rejected, and the true nature of the transaction was determined to be an assignment to secure payment of the attorney's fee.[8] If a client assigns to his attorney an interest in oil lands in return for legal services rendered by the attorney to establish the right of

[5]Harry Friedman, 45 B.T.A. 976 (1941), aff'd, 130 F. 2d 361 (C.C.A. 4th, 1942).
[6]L. F. Ratterman, 1948 P-H TC Memo. Dec. 48,130 (1948).
[7]Carey Van Fleet, 2 B.T.A. 825 (1925).
[8]Martin C. Ansorge, 1 T.C. 1160 (1943), aff'd, 147 F. 2d 459 (C.C.A. 2d (1945); Henry Escher, 1934 P-H BTA Memo. Dec. 34,261 (1934), aff'd, 78 F. 2d 815 (C.C.A. 3d, 1935).

the client in such lands, the reasonable value of the interest assigned constitutes ordinary income to the attorney.[9]

An attorney receiving property as compensation for services must include in his income the fair market value of such property. The fair market value of the property must be determined as of the date that the property is received even though a portion of the services are rendered in a subsequent tax year.[10] A law partnership received stock in a corporation on September 7, 1929, at which date it had a fair market value of $18.00 per share. The partnership was required to use that value in reporting taxable income even though the stock had a value of $3.00 per share when the partnership income was distributed on December 31, 1929.[11]

Because of the ethical problems incident to the attorney-client relationship, attorneys who have resorted to various income-splitting devices have had to combat the reluctance of the courts to sanction any scheme which might disturb that relationship or permit any person not an attorney to share in a legal fee. An attorney had retired from practice but permitted the law firm of which he had been a member to continue using his name. In return for use of the attorney's name and in consideration of past services to the firm, the retired attorney was to receive a certain share of the future income of the firm. The attorney assigned his right to receive such income to one of his former law partners in trust for the attorney's wife. In ruling that the income would be taxable to the husband the court indicated that there was no assignment of a property right in the granting of permission to continue the use of the retired partner's name since it would be unprofessional to hire out one's name. The payments were held to be personal in character and not subject to assignment.[12]

Daugherty, an attorney, had been unsuccessful in protracted litigation to establish the right of his client to share in a trust estate. Some years later the prevailing party died, and counsel for the prevailing party advised Daugherty that by reason of the death of the prevailing party, he was of the opinion that Daugherty's client was now entitled to the trust estate. In the interim

[9]W. W. Sutton, 35 B.T.A. 348 (1937), aff'd, 95 F. 2d 845 (C.C.A. 10th, 1938); Mrs. J. Llewellyn, 1942 P-H BTA-TC Memo. Dec. 42,486; Thomas B. McCullough, 1940 P-H BTA Memo. Dec. 40,373.

[10]George Edward Allen, 1939 P-H BTA Memo. Dec. 39,131, aff'd, 107 F. 2d 151 (C.C.A. 4th, 1939).

[11]J. Kemp Bartlett, 28 B.T.A. 285 (1933), aff'd, 71 F. 2d 601 (C.C.A. 4th, 1934).

[12]Frederick L. Emery, 1933 P-H BTA Memo. Dec. 33,591, aff'd, 78 F. 2d 437 (C.C.A. 1st, 1935).

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Brothers-In-Law

And What They Are Doing in OTHER BAR ASSOCIATIONS

By George Harnagel, Jr., Associate Editor

George Harnagel, Jr.

ACCORDING to an article in "The Shingle" of the **Philadelphia** Bar Association a recent survey discloses that laymen rate the principal weaknesses of lawyers as follows: First, a tendency to procrastinate; second, a tendency to advise what can **not** be done, instead of endeavoring to find a proper way to do what the client wants; and third, over-attention to politics.

* * *

The **Mississippi** Law Journal discloses that Hon. L. A. Smith, Jr., Associate Justice of the Mississippi Supreme Court, after what must have been a wearisome review of the reports of that court, came up with these findings.

The longest opinion: *Mississippi v. Johnson,* 25 Miss. 625, comprising 259 pages plus 5 pages of syllabi.

The opinion citing the most authorities: *Lawson v. Jeffries,* 47 Miss. 686. It refers to 264 cases, textbooks and treatises—but has never been cited itself.

The case with the longest single sentence: *Kersh v. Lyons,* 195 Miss. 598, 15 So. 2d 768. The sentence contains 711 words and requires two full pages.

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The Public Relations Committee of the **Minnesota** Bar Association has prepared and is distributing a series of pamphlets to the public. Sample titles: "Joint Tenancy—Boon or Boomerang?", "First Steps in Buying a Home," "Have You Made a Will?"

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Doctors and lawyers of **British Columbia** have joined in organizing the Medico-Legal Society of British Columbia.

PRESIDENT'S PAGE

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that in these days of creeping inflation the furnishing of a satisfactory luncheon at a modest price is no mean task. The Committee's plan at present contemplates obtaining a written commitment for as long a period as possible from a responsible downtown caterer or restaurateur which would eliminate the necessity for the employment by the Association of cooks and waiters.

(4) One other matter may be of interest. A location for the proposed quarters in the vicinity of Fifth to Seventh and Spring Streets was approved by a vote of approximately 72%. 4% of those replying favored the Civic Center area. The balance of those desiring another location preferred other portions of the downtown Los Angeles area.

Under the circumstances it would seem quite clear that the proposed quarters must be located in the vicinity of Fifth to Seventh and Spring Streets.

Your Special Committee and Trustees desired me to thank the membership for their replies and interest in this important project.

Editor in charge of this issue—Edward C. Jones

1951-1952 Bar Association Committees

A major problem faced by each incoming administration is the appointment of committees for the forthcoming year. It is imperative that these committees be selected and begin functioning just as soon as possible after our annual meeting, February 15, 1951. I am sure that my successor, whoever he may be, will welcome the suggestion I am making here, namely, that our members desiring to be appointed to any Bar Association Committee immediately address an appropriate communication to Mr. J. Louis Elkins, our Executive Secretary, at 1124 Rowan Building, Los Angeles 13, California, stating the committee to which he would like to be appointed. These suggestions will be presented to the Association's forthcoming officers upon their election.

DANA LATHAM

CHATTEL MORTGAGES

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cannot challenge a defective mortgage.[12] As was so clearly stated in *Lemon v. Wolff:*

> "Only a creditor who has acquired a lien upon the mortgaged property by virtue of some kind of legal proceeding, or who is armed with some process authorizing a seizure of the property can question the compliance with these formalities. A mere creditor at large without some process for the collection or enforcement of his debt, cannot question the sufficiency of a mortgage which is valid between the parties thereto. . . ."[13]

Thus, an unsecured creditor who has had an attachment levied on the property as the property of the mortgagor may challenge the defective mortgage,[14] or a judgment creditor who has had an execution levied upon the property as the property of the mortgagor may likewise challenge the defective mortgage.[15]

Just how tangible this "specific right" in the mortgaged property must be is somewhat uncertain. In the leading early case dealing with this and related problems, the Court held that since creditors of the mortgagor could have put themselves in a posi-

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[12] *Sullivan v. Vera*, 125 C. A. 303, 13 P. (2d) 770 (1932).
See *Wolpert v. Gripton*, 213 Cal. 474, 480, 2 P. (2d) 767, 769 (1931).
[13] 121 Cal. 272, 275, 53 Pac. 801, 802 (1898).
[14] *Loosemore v. Baker*, 175 Cal. 420, 166 Pac. 26 (1917).
See *Chelhar v. Acme Garage*, 18 C. A. (2d) (Supp.) 775, 778, 61 P. (2d) 1232, 1233 (1936).
[15] *Chelhar v. Acme Garage*, 18 C. A. (2d) (Supp.) 775, 778, 61 P. (2d) 1232, 1233 (1936).

tion to challenge the late recorded mortgage but for an intervening insolvency, the assignee in insolvency could challenge the mortgage.[16] And, of course, a bankruptcy trustee, being placed by the bankruptcy statute in the position of a lien creditor or a creditor having a judgment on which execution has been returned unsatisfied,[17] very clearly is in a position to challenge the mortgage.[18]

It would seem, however, that when a representative of creditors, such as trustee in bankruptcy, asserts the invalidity of the mortgage, he should represent at least one creditor as to whom the mortgage is invalid under the California law. Admittedly, as is pointed out hereinafter,[18] once a bankruptcy trustee has upset a chattel mortgage which is invalid under the California law as against *some* of the bankrupt's creditors, the mortgage is invalid as to *all* of the bankrupt's creditors. Nevertheless, it would seem that there must have been some creditor at the outset as to whom the mortgage was invalid.

The importance of this whole requirement is very forcefully illustrated by cases such as *Harms v. Silva,*[19] and *F. C. Silverthorn & Sons v. Pac. Fin. Corp.*[20] There zealous unsecured creditors, intending to enhance their position, took mortgages with full knowledge of existing defective mortgages. Had these creditors merely asserted their rights as unsecured creditors and levied attachments or executions, they clearly could have upset the prior defective mortgages. However, as mortgagees who had taken with knowledge of the prior mortgages, they were properly held subject thereto.[21] Being subject thereto, they did not even have, as to the prior mortgagees, such specific rights in the mortgaged property as would permit them to question the prior mortgages, even though as to them as general creditors the prior mortgages were clearly still "void" under the statute.

A creditor can, of course, acquire the required "specific right" in the mortgaged property even after the defect in the mortgage

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[16] *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827 (1899).
[17] 11 U. S. C. A., Sec. 110, and Note 511 to that Section. Prior to the 1938 Amendments to the Bankruptcy Act this provision was contained in 11 U. S. C. A., Sec. 75.
Wolpert v. Gripton, 213 Cal. 474, 2 P. (2d) 767 (1931);
Noyes v. Bank of Italy, 206 Cal. 266, 274 Pac. 68 (1929);
In re Norman D. Kessler, U. S. D. C. (S. D. Cal.), No. 46,737-W. M., Los Angeles Daily Journal, July 16, 1949. (Applied to a Receiver in a Chap-XI proceeding.)
[18] *Infra*, Section 4.
[19] 91 Cal. 636, 27 Pac. 1088 (1891).
[20] 133 Cal. App. 163, 23 P. (2d) 798 (1933).
[21] See Section 3, *infra*.

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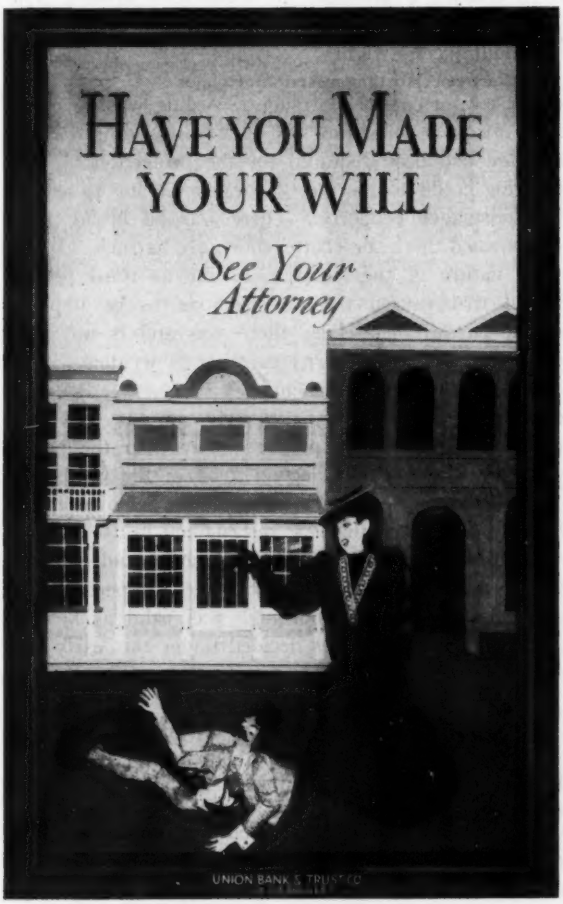

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has been cured.[22] As the Court pointed out in *Ruggles v. Cannedy*[23] where an "immediate" proper initial recording is required, it would be contradictory to permit a mortgagee to belatedly cure a defect and thereby fully reinstate the mortgage. This seems to embody a principle of "once void, always void" as to any specific creditor's claim or any specific subsequent purchaser or encumbrancer's right.

2. Validity as Between Mortgagor and Mortgagee

The whole system of chattel mortgage recording was developed to provide an adequate substitute for the change of possession which theretofore had been required for the protection of third persons extending credit to the mortgagor, or seeking to acquire rights in the mortgaged property. There was no broad public policy which frowned upon the chattel mortgage as such. It was the misleading nature of the situation so far as third persons were concerned that caused these restrictions to be imposed. As between the parties themselves, there was and is no sound reason for not enforcing the security contract as written without regard to these statutory requirements.

This reasoning is supported by the early statutes which expressly limited the invalidity to persons other than the parties to the mortgage.[24] In enacting Section 2957 of the Civil Code in 1872, such an express provision was omitted. However, the introductory part of Civil Code 2957, as enacted in 1872, which limited invalidity to creditors of the mortgagor and specified purchasers and encumbrancers of the mortgaged property, would seem to have inferred that the mortgage was valid as between the parties. Dicta in certain cases decided under this early code section adopted such an inference.[25]

In 1905 this principle was clearly adopted with the enactment of Civil Code, Section 2973[26] which provides that:

> "Mortgages of personal property, other than that mentioned in Section twenty-nine hundred and fifty-five, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between

[22]See *Cardenas v. Miller*, 108 Cal. 250, 39 Pac. 783 (1895).
[23]127 Cal. 290, 296-8, 53 Pac. 911, 913-14 (1899).
[24]Cal. Stats. 1850, pp. 199, 201; Cal. Stats. 1857, pp. 347, 348; Cal. Stats. 1861, p. 197.
[25]See *Ruggles v. Cannedy*, 127 Cal. 290, 299, 53 Pac. 911, 914 (1899).
See *Lemon v. Wolff*, 121 Cal. 272, 274-5, 53 Pac. 801, 802 (1898).
See *Adlard v. Rodgers*, 105 Cal. 327, 332, 38 Pac. 889, 890 (1894).
Sullivan v. Vera, 125 Cal. App. 303, 13 P. (2d) 770 (1932). (Decided after the enactment of Civil Code, Section 2973, but relying entirely on case authority without the help of the statute.)
[26]Cal. Stats. 1905, p. 617.

the parties, their heirs, legatees, and personal representatives. . . ."

This section is said to likewise make a chattel mortgage of a motor vehicle valid as between the parties though it is not recorded in compliance with the applicable sections of the Vehicle Code.[27]

3. Creditors, Purchasers and Encumbrances With Actual Notice

As to subsequent purchasers and encumbrancers of the mortgaged property the Code sections have always required at least that they take in good faith and for value.[28] Good faith seems to connote at least want of actual notice of the existing chattel mortgage.[29] As to creditors the law has not always been so clear. In an early case, which has since been reversed on other grounds,[30] the Court said by way of dictum that the mortgage was good as against creditors with actual notice. However, a

[27]See *Chelhar v. Acme Garage*, 18 C. A. (2d) (Supp.) 775, 777, 61 P. (2d) 1232 (1936).

[28]As a matter of statutory construction the Court in *Cardenas v. Miller*, 108 Cal. 250, 39 Pac. 783 (1895), made it very clear that the phrase "in good faith and for value" applied to purchasers and encumbrancers of the mortgaged property and not to creditors of the mortgagor.

[29]*Harms v. Silva*, 91 Cal. 636, 27 Pac. 1088 (1891), and *F. C. Silverthorn & Sons v. Pac. Fin. Corp.*, 133 Cal. App. 163, 23 P. (2d) 798 (1933).

[30]*Adlard v. Rodgers*, 105 Cal. 327, 38 Pac. 889 (1894).

year later,[31] the Court, also by way of dictum, but with unquestionable force, made it very clear that the defective chattel mortgage was invalid as to creditors even though they had actual notice thereof, stating:

> ". . . As to them (creditors) the question of actual notice is made wholly immaterial under the statute, and, consequently, knowledge on their part of the existence of such unrecorded mortgage will not protect its holder against their claims."

In 1905 the Legislature overruled this dictum of *Cardenas v. Miller* by the enactment of Section 2973 of the Civil Code.[32] which section, unchanged since its enactment, provides:

> "Mortgages of personal property, other than that mentioned in section twenty-nine hundred and fifty-five, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs, legatees, and personal representatives, and persons who, before party with value, have actual notice thereof."

Today there is no doubt that a creditor whose claim arose after he acquired actual notice of the defective chattel mortgage is subject to the chattel mortgage.[33]

An interesting case dealing with this problem held that the assignee of a creditor acquired all the rights of his assignor, including the right to challenge the chattel mortgage, even though before taking the assignment, the assignee had learned of the defective chattel mortgage.[34] This is a very interesting and sound correlation of the law of assignment of contract rights with the chattel mortgage statute.

4. Creditors, Purchasers and Encumbrances Without Notice

Here are the classes of persons for whose protection the statutory pattern was primarily designed—creditors of the mortgagor and purchasers and encumbrances of the mortgaged property whose claims arose and whose respective rights were acquired without notice of the non-conforming chattel mortgage.

It might well be argued that the protective arm of the statute should extend only to those who are *in fact* misled by the mislead-

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[31] *Cardenas v. Miller*, 108 Cal. 250, 39 Pac. 783 (1895).

[32] Cal. Stats. 1905, p. 617. Originally prepared in 1901 but held unconstitutional in the famous case of *Lewis v. Dunne*.

[33] *Wolpert v. Gripton*, 213 Cal. 474, 2 P. (2d) 767 (1931).
See *Chelhar v. Acme Garage*, 18 C. A. (2d) (Supp.) 775, 61 P. (2d) 1232 (1936) (Stating that this section applies here equally in the case of a chattel mortgage of a motor vehicle not duly recorded pursuant to the applicable sections of the Vehicle Code).

[34] *Old Settlers Investment Company v. White*, 158 Cal. 236, 110 Pac. 922 (1910).

ing situation arising from the non-conforming chattel mortgage. But it is very clear that the scope of the statute extends much further and operates to strike down the chattel mortgage in the appropriate case without inquiry into the misleading aspects of the particular case.

By the language of the statute[35] the invalidity extends to creditors generally and to *subsequent* purchasers and encumbrances of the mortgaged property. "Astute" counsel attempting to salvage their chattel mortgages lost no time in attempting to supplement the statute by drawing a distinction between creditors existing at the time of the execution of the defective mortgage and subsequent creditors, contending that the former were not protected by the statute.[36] However, the Court quite properly settled this point in *Noyes v. Bank of Italy*[37] by holding the defective chattel mortgage equally defective as to these prior creditors. As the Court pointed out, the misleading situation could as easily induce detrimental inaction on the part of these prior creditors as it could induce the extending of credit by subsequent creditors.

As has been indicated heretofore[38] in California it is clear that a defective chattel mortgage once void as to a creditor's claim or a subsequent purchaser or encumbrancer's right is always void with respect thereto. However, if a chattel mortgage, otherwise proper, is recorded late, the late recording is fully effective as against creditors' claims and purchasers' and encumbrancers' rights arising thereafter.[39]

Sometimes the mortgagee under a defective chattel mortgage may rectify his position by diligently pursuing his rights under the mortgage and, for example, selling the mortgaged property to a bona fide third person.[40] But, such diligence is not so beneficial in cases where, for example, the mortgagee repossesses and retains the mortgaged property,[41] or even where the mortgagee sells the property pursuant to a power of sale contained in the mortgage, and himself buys at the sale.[42] In such instances the possession by the former mortgagee is subject to the claims of protected creditors

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[35]Civil Code, Sec. 2957. See Note 4, *supra*.
[36]See *Ruggles v. Cannedy*, 127 Cal. 290, 299, 53 Pac. 911, 914 (1899). See *Loosemore v. Baker*, 175 Cal. 420, 166 Pac. 26 (1917).
[37]206 Cal. 266, 274 Pac. 68 (1929).
[38]*Supra*, Note 23.
[39]*United Bank and Trust Co. v. Powers*, 89 C. A. 690, 265 Pac. 403 (1928).
[40]This seems to have been the ultimate result in *F. C. Silverthorn & Sons v. Pac. Fin. Corp.*, 133 Cal. App. 163, 23 P. (2d) 798 (1933).
[41]*Loosemore v. Baker*, 175 Cal. 420, 166 Pac. 26 (1917).
[42]*Chelhar v. Acme Garage*, 18 C. A. (2d) (Supp.) 775, 61 P. (2d) 1232 (1936).

and the rights of protected purchasers and encumbrances without regard to any new rights in the former mortgagee predicated upon the "foreclosure."

Generally, the invalidity of the chattel mortgage is not infectuous. It does not extend to persons not themselves within the protection of the statute. Thus where the claim of the challenging creditor as to whom the mortgage is invalid is less than the value of the mortgaged property, the excess must go, not indirectly to the mortgagor to become available to satisfy general creditors, but rather directly for the benefit of the mortgagee under the defective mortgage.[43] There is, however, one apparent exception to this rule that invalidity is not infectuous. In the event of the bankruptcy of the mortgagor, if the mortgage is invalid under the State law as to some creditors, and acting on behalf of these creditors, the trustee challenges the mortgage, the United States Supreme Court has held that, as a matter of convenience in the administration of the Bankrupt Act, the mortgage is to be treated as void as to all creditors.[44]

5. Possibility of Remedying a Defectively Recorded Chattel Mortgage

Where a chattel mortgagee has committed an error by failing to strictly adhere to the statutory procedure, can he correct his error by releasing that chattel mortgage and having a new chattel mortgage properly executed and recorded? Certainly, if the initial mortgage in is fact released, the mortgagee's position might well be adversely affected by intervening rights in the mortgaged property and the possible application of the four months' bankruptcy preference rule. The assumption of these risks might seem to be a fair basis for permitting the mortgagee to rectify his previous error.

If a mere starting over would not be enough, would a starting over with some slight revision in the terms of the mortgage or some slight change in the mortgaged property be enough? Or, if a slight change would not be enough, would a substantial change be enough?

While the absence of authorities leave the answers to these propositions open, certainly it might well be that an error once made here is not forever beyond rectification.

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[43] *Loosemore v. Baker*, 175 Cal. 420, 166 Pac. 26 (1917).

[44] *Moore v. Bay*, 284 U. S. 4, 52 S. Ct. 3, 76 L. Ed. 133 (1931). (Unfortunately both counsel for the trustee and the Court erroneously referred to Civil Code, Section 3440, when they should have referred to Civil Code, Section 2957.)
Bowden v. Bank of America, 97 A. C. A. 802, 213 P. (2d) 1010 (1950).

THE CONSTITUTION

(Continued from page 166)

6. To coin money and regulate the value thereof and fix the standards of weights and measures;

7. To declare war;

8. To raise and support armies and to provide and maintain a navy;

9. The power to make treaties under the authority of the United States (Article VI, section 2).

At this time it should be noted that the American system of government was entirely the creation of the American people and American way of life, and that under the Federal Constitution, one of the purposes was to eliminate the doctrine of an all-powerful legislature as well as an equally powerful administrative or executive division. Under the English law neither division of government was subject to any judicial control. Hence both operated independently, exclusively, and to a great extent, without restraint and without restraint upon each other.

To obviate any such situation in this Country, there was incor-

porated in our Constitution and created the United States Supreme Court with power to determine all cases arising under the Constitution and laws of the United States.The Supreme Court was set up as a bastion against the encroachment by the legislative or executive branches of the government against each other or by them against the sovereign rights retained by the people, and consequently to prevent any arbitrary, unlawful or self-assumed power by either the executive or legislative branches of the government.

It was the intention of the framers of the Constitution that the Supreme Court be established nonpartisan, free and independent, and beyond the pressure of any whim and caprice of public factionalism, fanaticism, public clamor, or the platitudes of the masses. The court was established to be an all-time bulwark against such pressures and against infractions of the Constitution, however minor or serious, that might occur, and for the purpose also of declaring null and void any usurpations of power or encroachments that might occur by either the legislative or administrative branches of the Federal government. For this reason, the Supreme Court was placed beyand all approach and appointed for life.

The constitutional principle of complete sovereignty of the people, and that the states operated as independent political units, and that the Federal government existed by reason of a grant of powers by the people was thereafter respected for at least one hundred years. Under the protection of these principles and the establishment of this dual system of government, the United States became the freest and the most stable government in the world. The liberty enjoyed by the citizens of this Country was unequaled and unparalleled from the earliest records of organized society, dating back at least four thousand years B.C. up to and including the present time.

It would be well to note at this time, however, that in the year 1819, the Supreme Court of the United States, in the case of *McCulloch v. Maryland,* speaking through Chief Justice Marshall, enunciated a principle obviously necessary to a proper construction of that case, but which later served as a yardstick for the unwarranted assumption by Congress of vast powers never intended by the framers of the Constitution nor by the states

subscribing thereto. This doctrine, simple at the time of its creation, was as follows:

> "There were to be implied to the federal government all powers necessary to the exercise of the enumerated powers to the federal government."[5]

However, with some deviations, this principle (*McCulloch v. Maryland*) was strictly adhered to and powers that could not be truly and honestly considered as powers necessarily implied from the specific grants of power to Congress were not enlarged (License Cases, 5 Howard, 46 U. S. 504 [1847]), and the American government flourished and progressed under the dual system of government, as contemplated by the Federal Constitution.

Indeed, even after the war of the rebellion in 1866, during times of the greatest internal and national stress ever faced by the United States, in affirming the elementary principles of the Federal Constitution and the sovereignty of the people of the states, the Supreme Court states in *Ex parte Milligan*[6] as follows:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory on which it is based is false; for government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

However, from approximately 1887, the Supreme Court, slowly at first but thereafter during the years gaining momentum, enlarged by judicial construction the authority of the Congress of the United States and decreed as valid acts of Congress on the premise and ground that such legislation was a proper and necessary implied power to an express grant of power to Congress under the Constitution. The decision of the Supreme Court in *Bowman v. The Chicago Railway Company,* 125 U. S. 465 (1887), indicates the beginning of this trend of construction enhancing the "implied powers of Congress." In this case the legislature of the state of Iowa, acting under the police powers and the

[5] *McCulloch v. Maryland,* 4 Wheaton, p. 316.
[6] 71 U.S. 2 (1866).

sovereign rights of the people, had decreed that common carriers bringing intoxicating liquors into the state must first obtain a certificate from state authorities. The enactment by the legislature of this law was necessary to adequately enforce the policy of state prohibition against the manufacture or sale of intoxicating liquor.

The desires of the people of the state of Iowa in this regard were swept aside by the Supreme Court in this decision, and the state legislation nullified in so far as this case was concerned, the Supreme Court, in construing the "implied powers of Congress" and the powers of Congress to regulate interstate commerce, held that the Iowa legislature violated implied powers granted to Congress under the Commerce Clause, and states in part as follows: "The statute of Iowa . . . (requiring a certificate) is essentially a regulation of commerce among the states within any differentiation given to that term or which can be given; and although *its motive and purpose are to perfect the policy of the state of Iowa in protecting its citizens* against the evils of intemperance, it is none the less on that act a regulation of commerce." (Emphasis added.) And so this state legislation and desires of the people of the state of Iowa were nullified and terminated.

This trend, however, towards liberal and enlarged construction of (implied) powers of Congress saw through the ensuing years, however, sporadic but continuous enlargement. As vacancies occurred, obviously personnel on the court changed. There were also, however, placed upon the Supreme Court conservative lawyers and students of the Constitution and men studied in the fundamental principles of American government.

One of the greatest exponents of American Constitutional government, as contemplated by the American Constitution and the American way of life, was Justice David J. Brewer who was a member of this distinguished bench from 1890 to 1910. One of his decisions standing out as a milestone in United States jurisprudence and coming at a time in which the trend of the court was and had been for some time toward "liberal construction" of legislative powers was the decision rendered in *Kansas v. Colorado,* 206 U. S. 46 (1906), in which he states, on behalf of the court, that the United States government is one of enumerated powers and has no inherent powers of sovereignty; that this enumeration is to be found only in the United States Constitution,

and that if Congress seeks new powers, it should be obtained as provided in the Constitution, and that the reservation and the reaffirmance of the rights of the people and the states, as set forth in the Ninth and Tenth Amendments to the Constituton, are to be construed in simple English and are to mean what they say, and that ". . . The proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution independently of the amendments . . . This natural construction of the . . . Constitution is made absolutely certain by the Tenth Amendment. This amendment which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted."[7]

This decision again reaffirmed and re-established principles of constitutional government but not for long. The doctrine of

[7]*Kansas v. Colorado*, 206 U.S. 46, p. 89.

implied powers was again to be reaffirmed by the Supreme Court soon thereafter and in no uncertain fashion. Numerous decisions thereafter followed over a period of years and down to the present time which have opened the gates with increasing acceleration to Federal legislation and to administrative acts of the executive department in a manner never contemplated or comprehended by the states ratifying the Constitution, by the framers of the Constitution, or by the Constitution itself.

In 1919 this drift from the Constitution again became apparent. On November 21, 1918, there was enacted the "War Time Prohibition Act" (40 Stat. 1046). This was approved *ten days after the Armistice with Germany was signed.* It provided that until the conclusion of the present war and thereafter until the termination of demobilization it was unlawful to sell alcoholic beverages. The Act stated that this was for the purpose of conserving manpower. It is to be noted that under the grants of power to Congress, there is no right given to legislate on the question of prohibition, and that if this legislation is a valid exercise of legislative power, it would have to be affirmed as an "implied power" incidental to a direct grant of power to Congress. It is to be noted that this legislation was enacted after the capitulation of Germany and the signing of the Armistice. However, the Supreme Court affirmed this legislation of Congress and held this legislation a "war power"—a power of Congress arising under its right to declare war and "to make all laws which shall be necessary and proper for carrying into execution"[8] the powers expressly granted. This appears to be the first time that reference is had to "war powers" of the United States, powers that arise by implication from express grants of power to the Federal Legislature.

This decision opened the door to limitless legislation by Congress on the theory that legislation was justifiable as a war power. A right or power of Congress to enact legislation derived from the direct power to declare war, and to enact such legislation as may be necessary to enforce the same.

The vicious part of this unbridled power is that *these war powers are not confined to a period of time at which the Country is actually engaged in a state of war.* Let us examine further.

There was passed by Congress, *effective July 1, 1947,* and prac-

[8]*Hamilton v. The Kentucky Distilleries Co.*, 251 U.S. 146, p. 156 (1919).

tically two years after the complete capitulation of Japan, what was known as the Housing and Rent Act of 1947, effective July 1, 1947, regulating the maximum price of rents to be charged under the authority of the Housing Administrator. The constitutionality of this litigation was affirmed by the United States Supreme Court[9] as valid legislation of Congress under their "war powers." And it is to be noted that in affirming the Housing Act of 1947, the Court cites with approval and authority the decision rendered in 1919 in *Hamilton v. The Kentucky Distilleries Company, supra,* as its precedent, and concludes that ". . . the war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues for the duration of that emergency. Whatever may be *the consequences when war is officially terminated, the war power does not necessarily end with the cessation of hostilities.*" (Emphasis added.) And most significant is this statement of the court: "But we cannot assume that Congress is not alert to its constitutional responsibilities."[10] In connection with this statement, it is well to remember that the Supreme Court is and was to act as a bastion and bulwark against the encroachment by Congress upon any other departments of the government or the Constitution itself. The history of congressional legislation indicates to the contrary, and that Congress has time and again directed legislative mandates contrary to its power, and that on such occasions it has not been alerted to its Constitutional responsibilities, and that the Supreme Court has had to vitiate and set aside such acts of Congress.

In this holding (*Woods v. Miller Co., supra*), there is a concurring opinion, written by Justice Jackson who, while affirming the legality of the legislation, nevertheless views the same with great concern and skepticism, declaring that "the government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable 'war power.' No one will question that this power is the most dangerous one to free government in the whole catalogue of powers . . . ." At the time of the present writing, it is five years and four months since Japan completely capitulated and under the guise of war powers, the Federal government has and is enacting legislation not authorized under the Federal Constitution nor possible of conscientious construction as a "war power" of Congress.

[9] *Woods v. Miller Co.*, 333 U.S. 138 (1947).
[10] *Woods v. Miller Co.*, 333 U.S. 144 (1947).

One of the greatest detours from the Constitution is to be found in the construction of "implied powers" to Congress resulting from the grant of power to Congress to regulate commerce among the states. This big step was made in the sanctioning of Federal legislation by the Supreme Court in a divided opinion rendered in 1935 in the case of *Ashwander v. The Tennessee Valley Authority*, 297 U. S. 288. This decision literally and actually put the Federal government into the business of distributing and selling electric power over large districts and to expel companies which had long serviced them and the control of the markets therein. This with all the protective rights of the sovereign and subject to no limitations whatsoever. A brief résumé of the history of this litigation and the ultimate finding of the Supreme Court is illuminating and the full import of its decision startling and amazing.

The Tennessee River is approximately nine hundred miles in length. The drainage basin approximately forty thousand square miles; the volume of water is extremely variable; commercial navigation is of moderate importance. However, during and immediately after World War I, there was constructed at Muscle Shoals, near Florence, Alabama, the Wilson Dam. With its auxiliary plants, including the hydro-electric power plant, they were intended to be adapted to the purpose *of national defense.* Also, the Act authorizing the creation of the same, the Defense Act of June 3, 1916, had in view "improvements to navigation." As a result of this, the Federal production of electricity soon commenced. Some was devoted to government purposes; much was sold but delivery made at or near the Dam.

On May 18, 1933, Congress created a corporation, known as the Tennessee Valley Authority, and operations were begun for improving the Tennessee River navigation, *and especially for developing the water power along the whole river at public expense.* This plan involved conversion of water power into electricity for wide distribution throughout the Valley and adjacent territory.

The United States government immediately thereafter acting through its creation, the Tennessee Valley Authority, promptly took over the Wilson Dam; construction work began on the Wheeler Dam, twenty miles up the river; and the Pickwick Dam, some forty miles lower down. It commenced construction on the Norris Dam, across the Clinch River, a branch of the Tennessee

River two hundred miles above the Wilson Dam. All of these additions were to be connected by transmission wires, and electric energy distributed from them to millions of people in many states.[11]

At this time it is to be noted that during the last thirty years (prior to 1935), several corporations had been engaged in the business of developing electrical energy. It finally resulted in an extensive business having been built up; all private corporations, of course, and operated under state supervision. Among them were the Alabama Power Company, Georgia Power Company, Mississippi Power Company, and the Tennessee Electric Power Company. They were ultimately banded together under the mother company of the Commonwealth and Southern Corporation. During this time and during the creation of these big private enterprises, huge sums of money were invested by thousands of persons in many states of the Union, and the companies were at all times diligently developing their several systems in response to the demands of the people in the territories that they served.

The creation of the Tennessee Valley Authority was to put the United States government into the business of distributing and selling electric power through the same districts serviced by the aforementioned private power companies, and to expel the power companies which had long serviced them and to control the market therein.[12]

The question before the Supreme Court was that the Tennessee Valley Authority was not properly created nor authorized by any express grant of power or right to Congress, nor were the

[11]Dissenting opinion of Justice McReynolds, *Ashwander v. The Tennessee Valley Authority*, 297 U. S. 288.
[12]See, *Report of the Tennessee Valley Authority* for 1934-35.

rights assuming to be exercised by Congress in the creation of the Authority proper incidental powers to be derived from any express power granted to Congress.

The majority opinion in affirming this Federal legislation held ". . . The Act of 1916 had in view 'improvements to navigation.' Commerce includes navigation. The power to regulate interstate commerce embodies the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist. The government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident to the construction of the dam. That water came into exclusive control of the federal government. The mechanical energy was convertible into electric energy, and the electric energy thus produced constitutes property belonging to the United States."

By this construction the government was put into active competition, with all the exemptions of sovereignty, with private enterprise, which was subject to all of the burdens of government and of sovereignty.

A very capable dissenting opinion is written by Justice McReynolds in which it is pointed out that the public service corporations which were and had been servicing the millions of people in many states were to be brought to such terms as the Valley Authority *saw fit to dictate, or to be put out of business,* and that an early expenditure for this purpose of public funds of at least 75 million dollars was appropriated by the directors for this purpose. The purpose of the Valley Authority was definitely to control the market of selling and distributing electric power heretofore serviced by private companies. And the dissenting opinion clearly points out that "a government instrumentality had entered upon a pretentious scheme to provide a yardstick to the fairness of rates charged by private owners and to attain 'no less a goal than the electrification of America.' "

Under the competition of Federal enterprise tax free and subject to no limitation other than the sovereign may desire to prescribe for itself, and free from any state limitation whatsoever, it is clear that the power companies, operating under the name of the Commonwealth and Southern Corporation, were either to be forced into bankruptcy, or to comply with the pleasures of the Valley Authority. They chose the latter.

The Alabama Power Company agreed to sell for one million dollars all of its low tension transmission lines, substations, and all rural lines in five Alabama Counties and parts of two others.

The Mississippi Power Company, for eight hundred and fifty thousand dollars, agreed to transfer all of its transmission and distribution lines, substations and generating plants in nine counties in the state of Mississippi to the Authority.

For nine hundred thousand dollars, the Tennessee Power Company agreed to convey its transmission and distribution lines, substations, and distribution system in four counties in Tennessee and all of the 66 K.V. transmission lines from Cove Creek to Knoxville, Tennessee, to the Valley Authority.

Justice McReynolds in his conclusion states that "Congress has no constitutional authority to authorize the Tennessee Valley Authority or any other federal agency to undertake the operation essentially permanent in character of a utility system for profit, involving the generation, transmission and commercial distribution of electricity within state domain, having no reasonable relation to a lawful government use." He further states, "if under the thin mask of disposing of property the United States can enter the

business of generating . . . and selling power . . . with the definite design to accompany industry wholly beyond the sphere marked out from time to time by the Constitution, an easy way has been found for breaking down the limitations . . . to guarantee protection against aggression."

Clearly, the holding of the majority of the Supreme Court constitutes constitutional amendment by judicial legislation. Now for a step further and as a natural consequence of the breakdown of constitutional barriers, let us analyze the holdings of the court in its construction of the Commerce Clause to be found in the case of *Wickard v. Filburn*, 317 U. S. 111, decided some seven years later (1942).

At this time there had been adopted by Congress the Agricultural Adjustment Act of 1938. It was amended in 1941, and this case has to do with the amendment of 1941. In this case the defendant Filburn had for many years owned and operated a small farm in Ohio. From this farm he obtained his living by selling cattle, milk, and raising poultry. To keep the farm operating properly, he raised a small acreage of winter wheat, which when sown in the fall was ready for harvest in July. Of this small amount of wheat, he would sell a portion of the crop to feed part of the poultry and livestock; another portion of the crop he used for home consumption; the rest of the crop he kept for seeding for the ensuing year. Under the terms of the Agricultural Adjustment Act, an order was issued limiting Filburn to 11.1 acres for the raising of wheat and each acre not to yield more than 20.1 bushels of wheat. Apparently, finding that he could not adequately operate his small farm on this arbitrary allotment, he planted and sowed *23 acres* of his land with wheat, and harvested from the excess acreage sown (11.9 acres), excess bushels in the number of 239. Under the terms of the Agricultural Adjustment Act, he was now subject to a penalty of 49¢ a bushel, or $117.11, and because of his refusal or inability to pay the penalty, he was refused a marketing card. Obviously the effect of this was to put him out of business.

The question of the constitutionality of this Act was presented to the Supreme Court and the Court affirmed the validity of the Act on the ground that the Act constituted *a regulation of interstate commerce* and as such was the exercise of a power authorized to Congress.

The validity of this Act is justified by the Court in part in the following words: "The general scheme of the act is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages, and the consequent abnormal low or high wheat prices and obstructions to commerce."

The opinion also asserts the following conclusion of the Court: "The question (constitutionality of the Act) would merit little consideration since our decisions in *United States v. Darby*, 312 U. S. 100, *sustaining the federal power to regulate production of goods for commerce*, except for the fact that this act *extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.*"[13] (Emphasis added.)

Can this be said to be anything other than judicial enlargement of constitutional powers? And what has happened to the dual system of government contemplated by the Constitution in the face of this holding and the rights of the states and the sovereign rights of the people clearly defined in the fundamental law?

Does it not bear out the admonition and the warning emanating from the dissenting opinion of Justice McKenna, in the case of *Block v. Hirsh*, 254 U. S. 458, in which the majority opinion of the Supreme Court affirmed rent control of private property in the District of Columbia in 1921, in which Justice McKenna states: ". . . 'withstand beginnings.' *Boyd v. United States*, 116 U. S. 616. Who can know to what end they will conduct? The facts of this litigation point the warning. . . ."

The decisions, of course, are replete with similar holdings on "implied" powers of Congress relative to the Commerce Clause. However, this trend of construction does not stop with the Commerce Clause. The same "liberal" attitude or drift is to be found in the construction by the court of the power granted to Congress "the power to make treaties under the authority of the United States" (Art. VI, sec. 2).

Under the guise of a treaty with Canada protecting migratory birds, an act of Congress which standing alone was manifestly unconstitutional[14] now became the law of the land. *Missouri v. Holland*, 252 U. S. 416, opinion by Justice Holmes. But the

[13] *Wickard v. Filburn*, 317 U.S. 111, p. 123.
[14] *United States v. Shauver*, 214 Fed. 154 (1914);
United States v. McCullagh, 221 Fed. 288 (1915);
State v. Sawyer, 113 Maine 458 (1915);
State v. McCullagh, 96 Kansas 786 (1915).

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consequence of this holding and subsequent holdings is so very far-reaching and so transcends constitutional grants that they can only be adequately treated in a separate discussion.

And so it is clearly apparent that the inherent and sovereign rights of the people and the states, recognized and guaranteed in the Ninth and Tenth Amendments of the Constitution have been inched away by congressional usurpation of power and authority, and that legislative exercise of power in this respect has been affirmed by the supreme tribunal.

The great danger to be found in the wake of such expansion and centralization of power is totalitarianism and dictatorship. History is replete with the rise of false prophets motivated only by political success and desire for personal grandeur and personal enthronement, who through the usurpation of powers, will play to the platitudes of the masses and under the postulates of democracy will not hesitate to seize power and ultimately annihilate the sovereign rights of the people. A most casual analysis of the Hitler regime, the Mussolini dictatorship, the present Stalin bureaucracy advocating the alleged supremacy of the proletariat, illustrates nicely and comprehensively the complete assassination of sovereign rights and free enterprise, and the consequential results of the doctrine of "unlimited powers of federal government."

Such a situation and such contingencies and uncertainties were most comprehendingly discussed by President William Harrison in 1841, in succeeding to the presidency and after the expiration of the office of Andrew Jackson. In his only message to Congress, after pointed comments in regard to the powers assumed by Andrew Jackson, he follows with this observation:

> "This is the old trick of those who usurp the government of their country. In the name of democracy they speak, warning the people against the influence of wealth and the danger of aristocracy. History, ancient and modern, is full of such examples. Caesar became the master of the Roman people and the senate under the pretense of supporting the democratic claims of the former against the aristocracy of the latter; Cromwell, in the character of the protector of the liberties of the people, became the dictator of England, and Bolivar possessed himself of unlimited power with the title of his country's liberator. . . . The tendencies of all such governments in their decline is to monarchy, and the antagonistic principle to liberty there is spirit of faction—a spirit which assumes

the character and in times of great excitement imposes itself upon the people as the genuine spirit of freedom, and, like the false Christs whose coming was foretold by the Savior, seeks to, and were it possible, would impose upon the true and most faithful disciples of liberty. It is in periods like this that it behooves the people to be most watchful of those to whom they have entrusted power."

ATTORNEYS AS TAXPAYERS

(Continued from page 172)

Daugherty had become counsel for a large oil company and was now unable to handle the matter, but it was agreed that Daugherty was to receive 10% of the recovery although all work in connection with the case was to be performed by the other attorney. Daugherty rendered no services, but his name did appear on the pleadings. While the litigation was pending Daugherty assigned one-half of his interest in the recovery to his wife. The wife eventually received $47,000 for her share of the recovery, and she reported this sum on her income tax return. It was held, however, that the income from the assigned share of the recovery would be taxed to Daugherty because the agreement under which Daugherty acquired the interest in the recovery created an attorney-client relationship which prevented an assignment of the contract. Since the contract right could not be assigned there was merely an assignment of future income which would not be recognized for purposes of income taxation.[13]

A similar result was reached where an attorney assigned his interest in a contingent fee to a corporation in return for stock of the corporation being issued to him. The attorney controlled the corporation at all times. The fee was held taxable to the attorney on the ground that there was no assignment of property rights but merely the assignment of future income which would not be recognized.[14]

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[13]Harry A. Daugherty, 24 B.T.A. 531 (1931), aff'd, 63 F. 2d 77 (C.C.A. 9th, 1933).
[14]H. Lewis Brown, 40 B.T.A. 565 (1939), aff'd, 115 F. 2d 337 (C.C.A. 2d, 1940).

TO BE CONTINUED